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SERVICE DATE - AUGUST 25, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB No. 42014

SIMPSON STRONG-TIE COMPANY, INC.

v.

WILLIG FREIGHT LINES, INC.

Decided: August 21, 2000

We find that collection of the undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 13711. Because of our finding under section 13711, we will not reach the other issues raised in this proceeding.

BACKGROUND

This complaint arises out of a court action in the United States Bankruptcy Court for the Northern District of California in Willig Freight Lines, Inc. v. Simpson Strong-Tie Company, Inc.¹ (case adversary number not provided). The court proceeding was instituted by Willig Freight Lines, Inc. (Willig or defendant), a former motor common and contract carrier, to collect undercharges from Simpson Strong-Tie Company, Inc. (Simpson or complainant). Willig seeks undercharges of \$43,793.86 (plus interest), allegedly due, in addition to amounts previously paid, for services rendered in transporting approximately 200 shipments of construction materials (hangers or stirrups and related products) from San Leandro, CA, to points in Nevada, Washington, and Arizona. The shipments were transported between October 19, 1992, and May 17, 1994. By order dated March 31, 1997, the court stayed the proceeding to enable complainant to seek a determination by the Board of issues of rate reasonableness, unreasonable practice, and tariff applicability.²

Pursuant to the court order, Simpson, by complaint filed August 18, 1997, requested that the Board resolve issues of unreasonable practice and rate reasonableness. By decision served September 26, 1997, the Board established a procedural schedule for the submission of evidence.

¹ On October 19, 1995, Willig filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Northern District of California, Case No. 95-33940 DM.

² The court order was issued in the underlying bankruptcy proceeding as a case management order for the handling of undercharge claim adversary proceedings instituted by Willig.

On December 8, 1997, complainant filed its opening statement. Willig filed its reply on January 8, 1998, and complainant submitted its rebuttal on January 26, 1998.

Complainant asserts that defendant's attempt to collect the claimed undercharges constitutes an unreasonable practice under section 13711(a) and that the rates defendant now seeks to collect are unreasonable. Simpson maintains that it was offered transportation rates by Willig, that it relied upon the offered rates in tendering its shipments to defendant, and that Willig billed at the offered rates and accepted complainant's payment of the charges billed as payment in full.

Simpson supports its argument with a declaration from Michael Plunk, Warehouse Manager of complainant's San Leandro facility whose responsibilities include negotiating motor carrier freight rates. Mr. Plunk states that in late 1986 or early 1987 he entered into negotiations with Willig that resulted in Willig's agreement to apply a 35% discount to Simpson's class rated freight.³ He asserts that subsequent negotiations with Willig resulted in increasing the level of the discount from 35% to 47% and 50% (depending on the destination). Mr. Plunk maintains that complainant relied on the negotiated discount in marketing its product line, that Willig applied the negotiated discounts to complainant's full product line in billing for every shipment tendered by Simpson, and that the originally billed charges were fully paid by Simpson. He asserts that had defendant attempted to assess the undiscounted charges it now seeks to collect, he would have sought out one of the numerous other available motor carriers that offered comparable discount rates to transport Simpson's shipments. Included in Mr. Plunk's declaration as Attachment C are copies of seven sample balance due freight bills issued by defendant that contain originally issued freight bill data as well as "corrected" balance due amounts. An examination of these sample freight bills indicates originally billed charges to which discounts of 47% or 50% were applied and newly assessed charges that eliminate the originally applied discounts.

Defendant contends that the facts submitted by complainant are not sufficient to sustain an unreasonable practice finding and that complainant has failed to establish that the rates Willig now claims to be applicable are unreasonable. Willig supports its argument with a sworn declaration from Rodney Johnson, President of Trans-Allied Audit Co. Inc.⁴ Mr. Johnson explains the process used in issuing the balance due bills and attests to the rate accuracy of the amounts claimed. He indicates that defendant's published tariffs did not provide for the discounts originally applied to the subject shipments and that balance due bills eliminating the originally applied discounts were

³ According to Mr. Plunk, this agreement was embodied in a letter from Willig confirming Simpson's participation in Willig's Discount Tariff 603, Item 180, that provided for a 35% discount on Simpson class rated freight originating in San Leandro. The letter dated February 9, 1987, is contained in Attachment A to Mr. Plunk's declaration.

⁴ Trans-Allied was the organization retained by the Willig estate to audit freight undercharges for the 3-year period that preceded defendant's bankruptcy filing.

issued to correct the earlier billing errors. Included with Mr. Johnson's declaration are copies of 194 corrected balance due bills issued by defendant to complainant.⁵

DISCUSSION AND CONCLUSIONS

We will dispose of this proceeding under section 13711. Accordingly, we do not reach the other issues raised.

Section 13711(a) provides, in pertinent part, that "It shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to [the jurisdiction of the Board] . . . to attempt to charge or to charge for a transportation service the difference between (1) the applicable rate that was lawfully in effect pursuant to a [filed] tariff . . . and (2) the negotiated rate for such transportation service if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this section."

It is undisputed that Willig no longer transports property. Accordingly, we may proceed to determine whether defendant's attempt to collect undercharges (the difference between the applicable filed rate and the negotiated rate) is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 13711(a) determination. Section 13711(f) defines the term "negotiated rate" as one agreed upon by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed and for which there is written evidence of such agreement." Thus, section 13711(a) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains copies of virtually all of the balance due freight bills issued by Willig that indicate originally assessed charges to which substantial discounts (primarily discounts of 47% and 50%) were applied and newly assessed charges that totally eliminate the originally applied discounts. We find this evidence sufficient to satisfy the written evidence requirement. E.A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994). See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp., C.A. No. H-89-2379 (S.D. Tex. Mar. 31, 1997) (mem.) (finding that written evidence need not include the original freight bills or any other particular type of evidence, as long as the written evidence submitted establishes that specific amounts were paid that were less than the filed rates and that the rates were agreed upon by the parties).

In this case, the evidence indicates that the parties conducted business in accordance with agreed-to negotiated rates that were originally billed by Willig and paid by Simpson. The

⁵ These balance due bills conform with the sample balance due bills submitted by Mr. Plunk.

consistent application in the originally issued freight bills of assessed charges to which discounts of 47% and 50% were applied, together with the February 9, 1987 Willig letter confirming defendant's agreement to provide a discount rate, support the unrefuted assertions of Mr. Plunk and reflect the existence of negotiated rates. The evidence further indicates that Simpson relied on the agreed-to discount rates in tendering its traffic to Willig and would not have used Willig to transport the shipments at issue had defendant attempted to charge the undiscounted rates it now seeks to collect.

In exercising our jurisdiction under section 13711(b), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 13711(b)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 13711(b)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 13711(b)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 13711(b)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 13711(b)(2)(E)].

Here, the evidence establishes that negotiated discount rates were offered to Simpson by Willig; that Simpson reasonably relied on the offered rates in tendering its traffic to Willig; that Willig did not properly or timely file a tariff providing for such discount rates and has not entered into an agreement for contract carriage; that the negotiated rates were billed and collected by Willig; and that Willig now seeks to collect additional payment based on higher undiscounted rates filed in a tariff. Therefore, under 49 U.S.C. 13711, we find that it is an unreasonable practice for Willig to attempt to collect undercharges from Simpson for transporting the shipments at issue in this proceeding.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.
2. This decision is effective on its service date.

3. A copy of this decision will be mailed to:

The Honorable Dennis Montali
United States Bankruptcy Court for
the Northern District of California
P.O. Box 7341
San Francisco, CA 94120

Re: Case No. 95-33940 DM

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams
Secretary